KING ALFONSO AND THE WILD WEST: MEDIEVAL HISPANIC LAW ON THE U.S. FRONTIER

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ABSTRACT

"Medieval Encounters" include not only interaction between cultures, but also within cultures between widely separated time periods, and even influence by a medieval past upon a present culture or subculture. This can take the form of an evolution from past technologies or mentalities into the present, or even the development of merely analogous modern patterns quite different from the medieval to surface observation. One such artifact was the massive thirteenth-century Romanized law code of Alfonso X the Learned of Castile, called the *Siete partidas*, that survived within and alongside later Romanized codes throughout the Spanish empire, to acquire "the widest territorial force ever enjoyed by any law book." The medieval *Partidas* also became a living and formative presence even within the contrasting system of Common Law prevailing in U.S. jurisprudence, particularly in large regions like California, Texas, and Louisiana. This medieval artifact has variously manifested itself during the past century and still emerges in surprising ways in our courts, a relatively invisible ghost from the ancient past inviting study by both medievalists and Americanists, with implications for environmentalism, women's rights, and resource control.

The developing United States frontier owed much to medieval technologies, both directly in the form of objects and tools as well as more obliquely as patterns and paradigms and mentalities. My predecessor at U.C.L.A., Lynn White Jr., brought this forcibly to our attention in his celebrated "Legacy of the Middle Ages in the American Wild West." Popularizers like Jean Gimpel synthesized and advanced the evolution of this technological field.[1] The frontier had borrowed or adapted from the Middle Ages its log cabin and Conestoga wagon, the stirrup and

[1] White, "The Legacy," *Speculum*, 40 (1965), 191-202; reprinted in his *Medieval Religion and Technology: Collected Essays* (Berkeley and Los Angeles: University of California Press, 1978), 105-20, where other chapters also touch on this theme. Besides gunpowder, even "Colt's patent of revolving chambers has a line of ancestry reaching into the early fifteenth century" (113). Gimpel, *The Medieval Machine: The Industrial Revolution of the Middle Ages* (New York: Penguin Books, 1977).

effective horse-harness, the new mills and irrigation, the antecedents of the revolver and stagecoach and barbed wire, and of course the cowboys and western ranching methods. On a larger canvas, the society to which the West was a frontier zone could not have prospered without such gadgets as paper, eyeglasses, the book (codex), the clock, and even the functional button, that owed their origins or development to the Middle Ages.

The paradigms of behavior and mentalities as translated from the medieval context to the American frontier are in good part as yet unexplored, awaiting historical archaeologists of the text who have mastered both worlds at a given specific juncture. One example, beyond mere analogy, parallel, or comparison, and springing from common roots, was the continuity of patterns that carried from thirteenth-century Mediterranean Europe into both the Protestant and Catholic missionary movements on the nineteenth-century Pacific Northwest Indian frontier. One term of that Northwest comparison concerns crusaders against Muslims; the other involves the acculturative clash between American whites and native Americans. The circumstance of working in both those separate fields suggested exploring as a single phenomenon the thirteenth and the nineteenth-century movements in a study on "The Missionary Syndrome: Crusader and Pacific Northwest Religious Expansionism."[2] Such confluences, to the degree that their echoes still remain in our national character and institutions, led Lynn White to suggest that even today the United States may be "closer to the Middle Ages than is Europe." A similar conclusion from a different perspective came from the great medievalist Shelomo Goitein, whose working life had been spent in pre-Nazi Germany and then in Israel, but whose subsequent removal to the United States startled him with the medieval flavor of our social structures. As a lifelong medievalist he found that, unlike his previous countries, "one feels quite at home" in the American medieval context.[3]

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[2] *Comparative Studies in Society and History*, 30 (1988), 271-85. My major books in the separate fields began with *The Jesuits and the Indian Wars of the Northwest* in the Yale Western Americana Series (New Haven: Yale University Press, 1966) and *The Crusader Kingdom of Valencia: Reconstruction on a Thirteenth-Century Frontier*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1967), both interests continuing today.

[3] White, *Religion and Technology*, 105. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*, 6 vols. (Berkeley and Los Angeles: University of California Press, 1967-1993), 2:ix. Goitein's context is the Jewish community of medieval Cairo but would apply to the Mediterranean west as well. A "vigorous free-enterprise society" that is "loosely organized and competitive in every

King Alfonso's Roman Law

Among medieval technologies, and very central to the identity of frontiersman and common citizen alike, was the ubiquitous Common Law. Historians of the U.S. as well as educated laymen do appreciate to a degree the formative role of that law throughout the nation's history.[1] Less familiar is the role played on the American frontier by the very different and opposing system of Roman Law, particularly in its guise of Hispanic law, a system contrasting with Common Law in its assumptions, methodology, perspectives and procedures. Though Hispanic law incorporated many elements from Visigothic codes to high medieval *fueros*, and was to evolve further through successive reformulations and codes both domestic and colonial, one great text and one great lawgiver stand out. Alfonso X of Castile, el Sabio or the Learned, brought into his realms the legal revolution and Roman Law renaissance sweeping Europe in the thirteenth century. He gathered foreign and native jurisprudents to compile the massive code in Castilian called *Las Siete partidas* or *Seven Divisions*, loosely modeled on the Roman emperor Justinian's code but extensively and intensively transmuted into medieval and of course Hispanic forms.

In his exhaustive study of the evolution of Roman Law in Europe in the high middle ages, Harold Berman notes that when custom law and Roman Law converged, "the resulting ensemble was much different from either." Noting that this novelty "appears nowhere more strikingly than in the procedures" of the courts, Berman posits five major divergences of Romanized medieval procedure that distinguished it from its Roman predecessor. Another current student of that medieval law, R.H. Helmholz, remarks that Roman Law in medieval hands mutated into "an organized and sophisticated system, one that looked different in many respects from that inherited" from Rome; despite "the rules, principles, terms, and forms of Roman Law," the medieval product became in large part "a new creation." Spain contributed its share to that development.[5]

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respect," with a "general involvement in public affairs," also describes the thirteenth-century maritime societies of Italy, Southern France, and Catalonia.

[4] Assisted most recently by Norman F. Cantor's genial *Imagining the Law: Common Law and the Foundations of the American Legal System* (New York: Harper-Collins, 1997); see especially the final chapter on the United States, and the bibliographical orientation there.

[5] Berman, *The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), 250-51. Helmholz, *The Spirit of Classical Canon Law* (Athens, GA: University of Georgia Press 1996), 118, applicable to Canon and Civil laws.

King Alfonso's *Partidas* and other legal texts constituted only one of the creative projects for which he is celebrated as "The Emperor of Culture," and by which he also transferred Arabic and Jewish learning into the West on several fronts. His scientific projects, particularly the Alfonsine Tables in astronomy, involved teams of scientists over many years. His troubadour achievements culminated in the stunning *Cantigas de Santa Maria*, 427 poems with 1300 crowded miniatures detailing daily life, all set to music. Alfonso's books on gems and on games, his translated fiction, and his patronage of modern new-model history, all contributed to his fame as patron and scholar. He remains today the greatest poet-king of Western Europe, and by his various legal texts its greatest philosopher-king. By deliberately expressing much of this output, as well as the usual run of charters from his chancery, in Castilian instead of in traditional Latin, he elevated and in some sense "founded" Castilian as a literary language. At the same time he followed the life of a crusader warrior, conqueror, colonial administrator, and longtime candidate for Holy Roman Emperor.[6]

Alfonso's *Siete partidas* eventually spread with a spreading Spanish empire to Africa and Asia and the New World, achieving "the widest territorial force ever enjoyed by any law book" and becoming "one of the outstanding landmarks" not only of Spanish but "indeed of world law." Charles Sumner Lobingier, the eminent American jurist quoted here, adds that even "in a considerable group of jurisdictions now under the sovereignty of the United States, civilized law began with the *Partidas*."[7] The code itself is available in two competing texts, the classic edition by Gregorio López in 1555 and the inferior version by Spain's Real

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[6] *Emperor of Culture: Alfonso the Learned of Castile and His Thirteenth-Century Renaissance*, ed. Robert I. Burns S.J., (Philadelphia: University of Pennsylvania Press, 1990), especially introductory pp. 1-13; the authors systematically explore each element of his patronage. Compare idem, ed., *The Worlds of Alfonso the Learned and James the Conqueror: Intellect and Force in the Middle Ages* (Princeton: Princeton University Press, 1985). For biographies see Joseph F. O'Callaghan, *The Learned King: The Reign of Alfonso X of Castile* (Philadelphia: University of Pennsylvania Press, 1993); his *Alfonso X and the* Cantigas de Santa Maria: *A Poetic Biography* (Leiden: Brill, 1998); and Manuel González Jiménez, *Alfonso X, 1252-1284* (Palencia: Diputación Provincial, 1993). An introduction and leisurely summary of the *Siete partidas* is in John E. Keller, *Alfonso X, el Sabio* in the Twayne World Authors series (New York: Twayne, 1967), 116-33.

[7] Lobingier, in his introduction to Samuel Parsons Scott's English translation of *Las Siete partidas* for the American Bar Association (Chicago, 1931), xlix-liii. Lobingier was judge in the Court of First Instance in the American Philippines 1904-1914 and judge in the U.S. Court for China 1914-1924. For the American Philippines he asserts that "the *Partidas* were and are the common basic law," and that in the Supreme Court Reports there, "in nearly every volume there are citations to the *Partidas*" (liv).

Academia de la Historia in 1807. The Cortes or parliament made the Academia edition equal in legal usage to the López version in 1818, but Spain's Supreme Court soon reduced the Academia version in 1860 to supplementary status. Though both editions are living laws, used by courts in their various printings, neither one approaches the critical edition fondly hoped for by historians and literary scholars. Around the basic texts an academic industry of manuscript discovery and exploration, philological researches, and minute studies have accumulated. Jerry R. Craddock of the University of California at Berkeley has organized all such contributions on both the *Partidas* and all other legal Alfonsine texts into a bibliography of annotated entries, as *The Legislative Works of Alfonso X, el Sabio*, a project he is carrying forward in subsequent supplements.[8]

Aware of the importance of the *Partidas* for United States law, the American Bar Association promoted the first full translation into English by Samuel Parsons Scott in some 1,500 dense pages, based on the four-volume 1843-1844 Barcelona printing of the López version. This sole translation finally appeared in 1931. Today the University of Pennsylvania Press has in hand a reissue of the Scott translation, with appropriate historical/legal commentary. A final introductory note is needed. Hispanists by general consensus have long favored the view that the original *Partidas* was a closet or literary code of merely academic interest until promulgated as supplementary law in 1348, two generations after Alfonso's death. Joseph O'Callaghan now argues that the code had "the force of law in his court" immediately, from around 1265, as an outgrowth and amplification of Alfonso's earlier *Espéculo*.[9]

The Partidas *in U.S. Law: Louisiana*

It is not surprising that the *Partidas* enjoyed a considerable role in Spain's extensive empire, including Latin America and the Philippines down to our own day, not excluding the Philippines under American colonialist management until 1946. Less well known is the role of the *Partidas* and

[8] Craddock, *The Legislative Works of Alfonso X, el Sabio: A Critical Bibliography* (London: Grant and Cutler, 1986).

[9] *Learned King*, 36-37. For a discussion of the varieties of law in Alfonso's Castile, the historiographical debates around the *Partidas*, and the role of law in the king's policies, see Robert A. MacDonald, "Law and Politics: Alfonso's Program of Political Reform," *Worlds of Alfonso*, 150-202.

its allied codes within the United States.[10] In some states they were and are a vigorous presence, in others rather an historical memory, and in a few a surviving echo in one or other field of law. The jurist Lobingier notes, for example, that "Spanish law remained in force in Texas until 1840," and that "the *Partidas* are frequently cited in the early Supreme Court reports of that state."[11] Though subsequent codes, such as the *Nueva recopilación* of 1567 and the *Novísima recopilación* of 1805, had governed the Spanish colonies, the old codes such as the *Partidas* were not abrogated; all had to be examined by the courts, and on any number of points the *Partidas* would be decisive.

A caution is needed here. The *Partidas* did not work its magic in the New World as the direct and primary law of the land but rather as a living component of the developing Spanish codes, surviving as a main root, as foundation and principles, and as supplementary law. The influence of Hispanic law on Latin America or Unites States law is a broader concept therefore than the influence of the *Partidas* alone whether direct or indirect. It is not possible to discuss the history of Spanish law or of the *Partidas* in the New World without being aware of the intertwined nature of one with the other. Still, historians have never hesitated to single out the *Partidas* as a living code, a component of later contexts, the most radical and irrepressible element in the florescent later codes, with serious and frequent impact in United States law. The present essay then does not propose to trace the intricate manner by which the *Partidas* variously worked through or influenced New World Spanish law, much less how New World cultures, constitutional evolutions, and jurisprudence affected the Alfonsine contribution. That task would require another book, another perspective, and another lifetime. My more modest purpose here is to survey representative ways in which the Alfonsine code or its elements persisted in regions of the United States, issuing from the wider Spanish law historical context. In that focus the influence of Alfonso's *Partidas* is clearly discernible and justifies the dictum of the American jurist Charles Lobingier, cited above, that it has had "the widest territorial force ever enjoyed by any law book."

The Louisiana Purchase in 1803 doubled the size of the United States. Among its areas at least theoretically under Spanish law for a time were

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[10] On Latin American connections see John Thomas Vance, *The Background of Hispanic-American Law: Legal Sources and Juridical Literature of Spain*, 2d edn. (New York: Central Book Company, 1943), especially pp. 86-108 on the *Partidas*; cf. Craddock, *Legislative Works*, C 335, C 399, C 410, C 673.

[11] Lobingier, "Introduction," liv-lv.

the future states of Louisiana, Arkansas, Iowa, North and South Dakota, Nebraska, Oklahoma, and "the greater part" of Colorado, Kansas, Wyoming, Montana, and Minnesota. The end of our Mexican War in 1848 brought in the future states of Arizona, California, New Mexico, Texas, Nevada, and Utah, with parts of Oklahoma, Kansas, and Colorado. Spanish law was "formally in force" in American Florida, though from 1819 it became "not wholly disregarded." Incoming settlers diluted or displaced Spanish law in many places by their English Common Law. Spanish law for example had "no enduring influence" in Alabama and Mississippi. In places the Spanish influence surfaced in elements of family law, water or land rights, will probate, civil procedure, or crime. The peculiar system of marital community property continued particularly in Arizona, California, Nevada, New Mexico, and Texas. In some states an underlying French stratum reinforced the Spanish. A hybrid legal system evolved especially in Louisiana and Puerto Rico.[12]

No comprehensive history of the influence of the *Siete partidas* and other codes and components of Spanish law in the United States is available or envisioned. The obvious source materials, the relatively few articles, and an intimidating forest of case reports must serve, along with a brief but knowledgeable survey appended to Eelco van Kleffens's *Hispanic Law Until the End of the Middle Ages*. Four geographical areas may be selected, however, to illustrate more extensively as examples the nature and career of these hybrid legal systems—Texas, Louisiana (specifically the New Orleans regions), California, and in resource law the Southwest. Spain had acquired Louisiana from France in 1761, substituting Spanish law including the *Partidas*. After an ephemeral recovery by France under the Code Napoléon in 1800, the Territory of Orleans along with the rest of the Louisiana Purchase passed to the United States in 1803. Under the American flag, the Spanish system in the future state of Louisiana was to remain in place except where it might conflict with the United States Constitution or be amended. "A mixed or composite legal system then evolved," Van Kleffens notes, with criminal law especially reflecting the incoming Anglo tradition, while in property, persons, and obligations "Spanish and French legal ideas have kept the upper hand."[13]

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[12] Eelco Nicolaas van Kleffens, "Note on the Continued Validity After the Fifteenth Century of Medieval Hispanic Legislation," in his *Hispanic Law until the End of the Middle Ages, with a Note on the Continued Validity after the Fifteenth Century of Medieval Hispanic Legislation in Spain, the Americas, Asia, and Africa* (Chicago: Aldine, 1968), 255-82.

[13] Van Kleffens, *Hispanic Law*, 276.

To resolve the ensuing confusion in Louisiana, an official *Digest of the Civil Code Now in Force* was commissioned in French in 1806-1808 to apply the Spanish system. The *Digest* was then translated into English and sent to the courts, where Spanish, French, and English translators facilitated daily procedure. As a supplement in 1818 a translation of part of Alfonso's fifth *Partida* was brought out as a small book, with English and Spanish on facing pages. This proved so acceptable that the legislature commissioned the two translators to put into English all those parts of the *Partidas* in force locally, a two-volume work in 1820 with generous index.[14] In 1825 the Louisiana government drew up a *Civil Code*, using the *Partidas*, the 1808 *Digest*, and French and Anglo elements; again this was done in French, then translated into English. By the time the *Civil Code* was revised in English in 1870, Common Law elements had gained ground, though the Louisiana courts and the United States Supreme Court were still taking into consideration the *Siete partidas*. The *Partidas* indeed "have often been referred to in cases decided by Louisiana courts" and by the nation's Supreme Court in cases originating in Louisiana.[15]

Marilyn Stone has reported on the debate between legal scholars as to whether the present Louisiana code owes more to the Spanish or to the French legal systems. As part of this "tournament of scholars," she notes, Rodolfo Batiza of Tulane University concluded in 1971 that Spanish sources account for only eight percent of the 1808 *Digest*, and that *partida* four on loans and sales and *partida* five on marriage property were particularly influential on the 1825 *Civil Code*. Robert Pascal

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[14] Louis Moreau Lislet and Henry Carleton, *A Translation of the Titles on Promises and Obligations, Sale and Purchase, and Exchange, from the Spanish of "Las Siete Partidas"* (New Orleans: Roche Bros., 1818). The same translators, *The Laws of "Las Siete Partidas" Which Are Still in Force in the State of Louisiana*, 2 vols. (New Orleans: J. McKaraher, 1820). And see C. Russell Reynolds, "Spanish Law Influence in Louisiana," *Hispania* (U.S.), 56 (1973), 1076-82; Julio Barthe Porcel, "Las *Siete Partidas* y el vigente código civil del estado norteamericano de Luisiana," *Anales de la Universidad de Murcia*, 21 (1962-1963), 187-97; Henry P. Dart, "Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana," *American Bar Association Journal*, 18 (1932), 125-29. Cf. Craddock, *Legislative Works*, C 200, C 353, C 488-489, C 571. See also James M. McCaffery, "*Las Siete Partidas* en la jurisprudencia del estado norteamericano de Luisiana," *Revista de derecho privado*, 73 (1989), 938-44, and his "*Curia phillipica*, piedra angular de la ley española en Luisiana," ibid., 78 (1994), 433-38. And see Van Kleffens, *Hispanic Law*, 192, 273. In a forthcoming supplement to his *Legislative Works of Alfonso X*, Jerry Craddock notes an unpublished conference paper by Anthony J. Cárdenas in 1988, revised as "La tierra, el derecho y Colón," an "overview of the presence of Spanish legislation" in the United States, "with special reference to the *Partidas*."

[15] Van Kleffens, *Hispanic Law*, 273-74.

of Louisiana State University argues conversely that the *Digest* "was intended to, and does for the most part, reflect the substance of the Spanish law in force" and not the French. A project of the law school of Loyola University in New Orleans found Spanish law cited in judicial decisions from 1809 to 1828 four times more than French law, with the *Siete partidas* high on this frequency list; the 1820 translation of the *Partidas* increased its citation rate by a hundred percent. Professor Stone also calls attention to the 1981 congress in Madrid on the mutual influence of Louisiana and Spanish law, as well as the interest at Loyola University law school in more formal programs for joint Louisiana-Spain legal and cultural scholarship. Stone herself is particularly interested in the quality of the translations commissioned by the early legislature, a neglected aspect of juridical history.[16]

The Partidas *in Texas Law*

Recently the state of Texas became embroiled in a major dispute involving the *Partidas*, which sent lawyers scurrying to renew acquaintance with King Alfonso and his sources. The description here is from correspondence with the author initiated by the General Counsel of the Texas General Land Office. Founded in 1837, the General Land Office manages for the state over twenty million acres of public land, claimed at the independence of the Texas Republic in 1836. Though Texas adopted English Common Law in 1840, it retained and still follows Spanish law for property held by private parties under Spanish, Mexican, or Texas Republic grants. "Private parties" are now challenging the state over "public ownership of a large and valuable area of coastal public land," by a claim "based in large part on the interpretation of ancient legal texts including *Las Siete Partidas*, attributed to King Alphonso X of Castile," especially laws derived from the *Partidas* on seashores and wetlands. Under Spanish doctrine, "seashore" would belong to the crown, so that pre-1840 coastal private holdings in Texas would be bounded on the seaward side at the line reached by the water "during ordinary storms." Along the Texas coast the bounds set by Spanish law and those set by English Common Law "could vary by as much as 7 miles."

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[16] Marilyn Stone, "Roots of the Spain-Louisiana Connection: The Impact of Translations on the Heritage of Louisiana," *Proceedings of the 31st Annual Conference of the American Translators Association*, ed. A. Leslie Willson (Medford, N.J.: Learned Information Incorporated, 1990), 253-58, with further bibliography on Louisiana's legal evolution.

Exactly where private upland meets "sovereign waters and submerged land" had become an urgent question by early 1995, and the services of Alfonso X were as urgently needed.[17]

Anglo settlers in Mexican Texas had comfortably accommodated themselves to the prevailing Hispanic legal system. As an American state young Texas had introduced English Common Law for criminal cases in 1836, while its fourth congress in 1840 made that law the general rule of decision. Joseph W. McKnight of Southern Methodist University has analyzed in a series of articles the hybrid survivals that emerged from that early experience. His "Spanish Elements in Modern Texas Law" clarifies the seashore complication we have just reviewed, and proposes three categories in which Texas law retains Hispanic principles or flavor. The categories are procedure, water and land ownership, and family law. Among the "striking Spanish overtones" in procedural law is the "single court system" where "all issues were considered simultaneously," as against the dichotomy of court-of-law/court-of-equity. In this respect, "Texas was the earliest of all English-speaking countries to adopt a permanent and full unitary system of judicial administration," a structure the Anglophone legal world has subsequently followed.

A procedural continuity, found in King Alfonso's *Partidas* and in Hispanic law generally, mandated that a case be tried in the place nearest and convenient for the defendant, rather than where the case originated. Though overlaid now with exceptions, this "basic rule of Texas law" in a lawsuit is "still that enunciated in the Castilian code of the thirteenth century." Procedural too was the "simple pleading" by both parties in a "straightforward and modern" way rather than in the Anglo usage of "special language" for "each different kind of complaint." This tradition disappeared after the Civil War era and is "only now gradually [re]emerging." A final procedural peculiarity has been "the institution of the independent executor" in probate law, which Texas evolved from an Hispanic base. "This provides for enormous flexibility in the administration of estates." Arizona and Washington borrowed this from Texas, and Idaho from Washington; eventually this "Texan transmission of her Spanish heritage" became part of the Uniform Probate Code in many other states.[18]

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[17] Martha McCable, General Counsel, Texas General Land Office, Austin, Texas, to the author on 16 May 1995 (all quotes).

[18] Joseph W. McKnight, professor of law as well as Larry and Jane Harlan Faculty Fellow at S.M.U., "Spanish Elements in Modern Texas Law," booklet (Dallas, 1979),

Under land and water survivals, Professor McKnight notes that "about one-seventh of Texas which is in private hands stems from grants of the Spanish and Mexican sovereigns." By international law private land titles there remained in force after Texan independence, while public land went to the new government. Thus an Hispanic and an Anglo system confronted each other. Seashore land held by a chain of Hispanic titles now starts on dry land "in accordance with mean highest high tide, whereas land held by post-1840 title starts from the line of "mean high tide," with the state holding the part along the sea. "In recent years a considerable amount of litigation has developed on these grounds following the discovery of oil and gas along the Gulf coast." Similarly, land grants along a navigable stream went by Spanish law "up to the edge of the stream," the sovereign or state owning the entire bed; Common Law titles after 1840 were given as far as a line "down the middle of the stream." A 1929 adjustment giving the bed to both classes of owners ran into some Hispanic law complications. Among water disputes involving Hispanic law, "the building of the great Falcon Dam on the Rio Grande in the late 1950s" affected downstream landowners who lost the flow; the courts concluded that "Texas as successor to the rights of Spain" had no obligation to those landowners.[19]

The last of the McKnight's three categories is family law, "the most striking residue" of the Hispanic system in the state. Adoption was a normal Spanish process, discussed at length in Alfonso's *Partidas* but alien and unknown to English Common Law. The influx of Common Law eliminated it in 1840; but in 1850 it was "generally reinstated," so that Texas "was the first Anglo-American state to institute adoption generally and permanently" (except for a Mississippi enactment of 1846). Texas also kept the "forced heirship" by which a testator could not wholly disinherit descendants, including adoptees, though a history of adjustments in 1856, 1931, 1967, and 1973 limited its force. Another family-law continuity was the acceptance of invalid but good-faith

3-5, including quotations; his "The Spanish Influence on the Texas Law of Civil Procedure," *Texas Law Review*, 38 (1959), 246-54; his "Law Without Lawyers on the Hispano-Mexican Frontier," *West Texas Historical Association Year Book*, 66 (1990), 51-65; and his allied "Justicia sin abogados en la frontera hispano-mexicana del norte," *Anuario mexicano de historia del derecho*, 10 (1998), 597-610. See also his more general "The Survival of Spanish Law in North America," *The Brief*, Southern Methodist University School of Law (Fall 1992), 2-7.

[19] McKnight, "Spanish Elements," 5-6. For more on this topic, see his "Watercourse Law" discussed below in note 32 and text.

marriages as valid for many legal consequences.[20] The "most significant Hispanic institution" carried over in Texas was the concept of community property, elevating the wife's status beyond anything conceived in Common Law. It will appear again below under California Law where its effects changed the national scene.[21]

McKnight takes up an important family legacy of Hispanic law that transformed society in early America, the Homestead Law. His treatment is especially seminal and intriguing since he deals not only with Alfonso's *Partidas*, but with the many subsequent evolutions in Hispanic and United States law on the topic, as a process of growth. His separate study catches this meaning, "Mexican Roots of the Homestead Law." The seed in the *Partidas* had been protection of categories both of persons and of possessions from seizure by one's creditors. One such Alfonsine law forbade debt recovery by taking a man's oxen, cows, domestic animals, plows; implements, agricultural tools, or slave workers. Two other *Partidas* laws protected from seizure a knight's horse, arms, pay, fief, cloak, shield, or house, if any other chattel or property were available. Spanish law eventually extended the categories of protected goods as well as the persons protected, until nearly everyone was covered. Anglo-Texans who settled Texas under Mexico had included so many with debts left behind in the States that the United States Congress pushed through a treaty with Mexico for debt enforcement; this protected settlers for a set time "in the Hispanic debtor-extension tradition." These preliminaries led to the innovative homestead act of 1839 and the more general act of 1845, an institution that "spread rapidly to Mississippi, Georgia, Florida," and soon to a number of other states; before the century's end it prevailed "in almost every part of the United States." By an irony of history, the evolved elaboration of Hispanic homestead tradition then entered the Mexican constitution of 1917.[22]

Though Texas served as seedbed in such developments, conversely it also received Hispanic legal influence circuitously from its eastern

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[20] McKnight, "Spanish Elements," 6. King Alfonso's *Partidas* has a long segment on adoption in book IV, title xvi, essays 1-10; cf. III, xviii, 91-92.

[21] See also McKnight, "Spanish Law for the Protection of Surviving Spouses in North America," *Anuario de historia del derecho español*, 57 (1987), 365-95.

[22] McKnight, "Mexican Roots of the Homestead Law," *Estudios jurídicos en homenaje al maestro Guillermo Floris Margadant* (Mexico: Universidad Nacional Autónoma, 1988), 291-304 (295-97, 304). The *Siete partidas* provisions are in its book III, title xxvii, essay 3, along with II, xxi, 23 and V, xiii, 4. See also McKnight's "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle," *Southwestern Historical Quarterly*, 369 (1982), 370-99.

neighbor Louisiana, notably through the official two-volume English translation of Alfonso's *Partidas* commissioned by the Louisiana legislature, "used extensively" in Texas, and in such items as the 1836 venue statute in Texas, derived "directly from the language of the Louisiana translation of the *Partidas*."[23]

The Partidas *in California Law*

Spanish law prevailed from 1769 in the region now constituting the state of California. That law survived Mexico's independence from Spain in 1810, her acquisition of the California regions from Spain in 1822, and the American conquest in 1848. American California's constitutional convention in 1849 after lively debate adopted that standing law, except where it might conflict with the national Constitution or would be changed by statutory modification. A popular election then ratified overwhelmingly this ancient law. From 1850 to 1879 the Spanish system was interpreted and amended by Common Law judges and lawyers but with little real change. The anomaly by which one system was understood in the terminology and principles of an alien system continued; but the Common Law now became more explicitly the rule of decision in California courts. As late as 1887, in a classic bibliographical survey, a Los Angeles lawyer urged his California colleagues to study Spain's "prior laws" as having affected "the legislation of our own times"; he particularly lauded that "wise code," the *Siete partidas* of Alfonso X the Wise.[24]

Spanish law notably affected property titles and marital community holdings in American California down to the present day, and each in turn can serve to illustrate the historical continuity. At the treaty ending the Mexican war in 1848 the United States undertook to protect current property titles and rights, encompassing in California then some

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[23] McKnight, "Law Books on the Hispanic Frontier," *Journal of the West*, 27 (1988), 74-84 (79).

[24] I must thank Maria Elena (Ruelas) Kennedy for her knowledgeable forays into the Los Angeles County Law Library on my behalf, and her enthusiastic xeroxing of California case laws. Only a few of the materials can be incorporated into this brief treatment, but even those omitted have supplied invaluable background. David T. Langum has a monograph on the failure of California to develop a true hybrid system like Louisiana's, as demographic and psychological factors overwhelmed the old order, in *Law and Community on the Mexican California Frontier* (Norman, Okla.: University of Oklahoma Press, 1987). The California lawyer's quote above is from Peter Reich's study on "Water Law" discussed below in note 32 and text; see pp. 881-82.

ten million acres of the best land. An act of 1851 established procedures for validation according to "the laws, usages, and customs" of Mexico. As titles changed hands through the generations, these holdings then continued to resurface. Need rarely arose to cite the *Partidas* specifically or any of the companion codes, but as in Louisiana they constituted the most active elements of this "Mexican" law. Decisions of the federal Supreme Court sometimes weave poignant stories from such title cases. Francisco Solano, for example, an "aboriginal" and the "principal chief of the unconverted Indians" in northern California's Sonoma jurisdiction as well as formerly a captain in the Mexican army, successfully vindicated his Spanish property rights by heredity and possession.[25]

More dramatic and bizarre was the recent Ballona tidelands case, which developed into a national *cause célèbre*. Title to those wetlands, originally part of a Rancho La Ballona, but now in the elegant Marina del Rey neighborhood of Los Angeles, had come into the hands of the celebrity eccentric Howard Hughes and through his estate into the Summa Corporation, which projected a billion-dollar development there. Though the Mexican title was clear and validated according to the 1851 act, the city of Los Angeles and the state of California sued the Corporation, alleging an implicit easement "for commerce, navigation, fishing, passage of fresh water to canals, and water recreation." City and state wished to exercise these sweeping invasive rights by state sovereignty instead of by eminent domain with compensation, asserting a "public trust" inherent. If successful, this land grab would affect 512 miles of California's 670 miles of coastline. If unsuccessful, the suit would hobble the series of public trust invasions which the California Supreme Court had made a threatening tool to intimidate property owners.

Ecologists entered the fray; the Audubon Society and the Sierra Club associated themselves in the case, as did the California Land Title Association. More significantly the Reagan presidential administration brought the federal government into the battle, as *amicus curiae* against California. In 1982 the state Supreme Court rejected all the Corporation's arguments. The United States Supreme Court, however, in an opinion delivered by Justice William Rehnquist in 1984, reversed that decision and vindicated the Spanish law position. The *Supreme Court Reporter* took note of "the expert testimony at the trial" about "*Las Siete Partidas*, the

[25] The United States versus Archibald Ritchie, U.S. Supreme Court, 10 March 1855. S.C. 17 How., 525-41.

law in effect at the time of the Mexican grant." And the *Los Angeles Times* in a front-page story noted the argument by state and city "that Mexican property law followed the old code called *Las Siete Partidas*, under which the sea, seashore, rivers, and harbors were held to 'belong to all persons.'"[26]

Another area of California's Spanish law that preserved its basic status over the generations, and has attracted much scholarly attention, is marital community property. The philosophical difference between Spanish and Anglo-American law on this matter appears succinctly in a report to the new California legislature in 1850. Spanish law "regards husband and wife, connected it is true by the nuptial tie yet disunited in person," as having "dissevered interests in property." From that vantage, their union is seen "in the light of a partnership, no more intimate or confiding than an ordinary partnership in mercantile or commercial business." In contrast, English Common Law considers the spousal bond "as so close in connection" that the two "become one in person, and for most purposes one in estate," with control of the family's property in the husband's hands as "in truth and reality the head of the household," conceding to the wife only dowry rights and the husbandly payment of her debts.[27]

Spanish law emancipated the wife, allowing her a separate property as well as an equal share in the community property over which the husband exercised dominion; expressions of this position are in both Visigothic and Alfonsine law, including the *Siete partidas*. California's constitutional convention, as the historian Peter Conmy reports, debated and approved this marital law as "more just, more specific, and especially so with respect to the rights of women," rejecting English Common

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[26] Summa Corporation versus California ex rel. State Lands Commission and City of Los Angeles; 466 U.S. 198, 80 L.Ed. 2d 237; argued 29 February 1984, decided 17 April 1984, rehearing denied 4 June 1984. *Supreme Court Reporter*, pp. 1753-58. *Los Angeles Times*, Monday, 9 January 1984, front page.

[27] Quoted at length in Peter Thomas Conmy, *The Historic Spanish Origin of California's Community Property Law and Its Development and Adaptation to Meet the Needs of an American State*, booklet (San Francisco: Native Sons of the Golden West, 1957), 9. See also the classic by William Quinby de Funiak and Michael J. Vaughn, *Principles of Community Property*, 2d edn. (Tucson: University of Arizona Press, 1971), ch. 3 on "Spanish Laws and their Historical Background," no. 29 on the *Partidas*, and especially ch. 4 on "Establishment of Community Property System in the United States," covering New France, the Louisiana Purchase territory, the Floridas, Texas, the Oregon Country, New Mexico, Arizona, California, and Nevada. A representative and useful item is Walter Loewy, "The Spanish Community of Acquests and Gains and Its Adoption and Modification by the State of California," *California Law Review*, 1 (1912), 32-45.

Law on the matter. The historian Rockwell Hunt in 1901 recorded that "this is believed to be the first time such power was granted to women by a state constitution." Legislation during the next quarter century further strengthened women's rights in that direction, while the novel context of more frequent divorces, women's suffrage, and working wives extended and liberalized its application.[28]

The most bizarre development of this Spanish inheritance followed the 1913 constitutional amendment allowing a federal income tax. California amended its community property law to define the wife as having vested interest in her equal share, so that she could declare liability for a half for tax purposes. Other states attempted this same evasion—Oklahoma in 1939 and 1945, and Oregon, Michigan, Nebraska, and Pennsylvania in 1945-1947. The Supreme Court of the United States addressed this taxpayers' revolt by declaring Pennsylvania's move to community property laws, unlike California's Spanish-based situation, to be unconstitutional. The consequent indignation of a national electorate, aroused over this seeming favoritism, forced Congress to revise the Internal Revenue Code in 1948 to embrace California's privilege for all other states and territories. In Conmy's words, "the community property principle received a national application in the limited field of income taxation."[29]

The Partidas *in Southwest Mining and Water Law*

The western states have variously enjoyed the forward-looking elements of the *Partidas* and its allied Hispanic codes, and variously betrayed them. Peter L. Reich of Whittier Law School is pioneering this story as it has affected natural resources law. His "Western Courts and the Privatization of Hispanic Mineral Rights" traces the removal of community sharing, or governmental fair licensing of gold and silver mining, into the hands of greedy exploiters with consequent large-scale damage to the environment. Hispanic law did not include mines and mining rights in a given land grant, unless expressly so stated. The surrender treaty of Guadalupe Hidalgo in 1848 enshrined that Hispanic situation for the United States Southwest, to the encouragement of prospectors, small mines, and governmental oversight. In California,

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[28] Conmy, *Spanish Origins of Community Property Law*, 7, 8, and note 29 (quotes).

[29] Conmy, *Spanish Origins of Community Property Law*, 21. De Funiak, *Community Property*, I, chap. 4, section 53.1.

Professor Reich notes, the state Supreme Court's "initial receptiveness to the Spanish and Mexican tradition" of ownership persisted until the bitterly fought case of Biddle Boggs versus the Merced Mining Company, involving the ambitions of the celebrated "Pathfinder" John C. Frémont. In a series of fluctuating decisions at that time, between 1858 and 1861, the state Supreme Court reversed the Hispanic tradition, "knowingly violated the Guadalupe Hidalgo treaty," and in a burst of judicial activism (perhaps influenced by bribery) turned over the state's subsurface resources to large-scale exploiters, limiting access by small miners. Reich argues that the *Partidas* and related codes were available at the time in public and private law libraries and were reasonably familiar to California's legal fraternity. The system prevailing in California from 1861, however, privatized essential public resources, foiled rational development of them, and encouraged big-business and hydraulic mining that deforested, polluted, contaminated with mercury, flushed away hillsides, and otherwise inflicted environmental damage.[30]

California's ill-conceived repudiation of Alfonso and the Hispanic mineral doctrine eventually contaminated its neighbor states, though much later. New Mexico Territory, from which Arizona Territory detached itself in the period 1864 to 1912, retained the Mexican-style public ownership of minerals from the 1840s until 1903. As late as 1888 and 1903, major decisions reasserted that Hispanic foundation. Only in 1903 did the New Mexico Supreme Court begin the swing away from the tradition of common sharing toward California-style privatization with its monopolistic consequences. In neighboring Arizona however Governor John Goodwin in 1864 lauded Hispanic mining law which avoided monopolies and which gave "full scope to the enterprise and energy of our people." The territorial legislature followed this tradition in its first mining statute. Only in 1925 did the Arizona Supreme Court follow California into privatization doctrine and practice. Texas went the same route after its 1866 constitution reversed its Hispanic doctrine. As late as 1986, however, Texas cited Alfonso's *Partidas* to reserve coal and lignite as state-owned! Despite its drift away from Alfonsine mineral law generally, Texas "in rare instances has resurrected it in support of the public interest." Ironically too, Mexico itself in the late

[30] Peter L. Reich, "Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: An Alchemy of Title," *Columbia Journal of Environmental Law*, 23 (1998), 57-87, especially 60 (receptive, knowingly violated), 73 (library availability), 76 (*Partidas*), 71-78 (California privatization sequence), and 86 (environment).

nineteenth century abandoned its own traditional public policy to favor greedy privatization with its inevitable degradation of the environment. The course of privatization elaborated in Reich's careful study holds important lessons for environmental protections and may point the way for some recovery of our Alfonsine heritage.[31]

In the arid southwestern states, water was a resource more valuable than the miner's gold and minerals. An impressive bibliography has accumulated over the past century around this tangled topic and its controversies. In a prizewinning study on "Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850," Professor Reich has critiqued that historiography and has brought to it a revisionist archival perspective. Hispanic water law with its Alfonsine foundations, protected by the Guadalupe Hidalgo treaty, saw water as a common resource, allocated or regulated in time of shortage by the authorities. A town thus had to share its water with other users in its region. American California's jurisprudence substituted instead an absolute right and monopoly on the part of Hispanic-origin towns. California arrived at this not via Anglo-American Common Law but through a fictional and gratuitous pseudo-Hispanic invention, a cultural-legal artifact reminiscent of the "Mission Revival" architecture encumbering the state. Reich explores minutely this "judicial hijacking," hitherto given a benign interpretation by legal scholars. The activist California and New Mexico courts, and the Texas courts from 1926 to 1962, "deliberately distorted historic communal water sharing in favor of municipal exclusivity and riparian innovation [in agriculture]," repeatedly transforming a common resource into a property right. Reich summarizes the faux-Hispanic doctrine: "an American successor municipality to a Spanish or Mexican pueblo has an absolute and exclusive right to all the surface and groundwater of a stream flowing through the original pueblo, including its peak floodflow and all its tributaries, from its source to its mouth," that is "superior to all other riparian and appropriative rights" as long as the city needs the water and despite its unending growth.[32]

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[31] Reich, "Mineral Rights," 78-85 (New Mexico, Arizona, Texas), 82 (Goodwin), 85 (coal; Texas quote), 87n. (Mexico).

[32] Reich, "Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850," *Washington Law Review*, 69 (1994), 869-925, especially 905 (summary quote), 923 (hijacking), and 925 (Texas quote). This study won the Ray Allen Billington Award of the Western History Association in 1995. In the *Partidas* see book III, tit. xxviii, 28-32 and III, xxxii, 13-18 (rivers "belong to all persons in common" and riverbanks have public usage). See also Jesús Lalinde Abadía, "La consideración jurídica de las aguas en el derecho medieval hispánico," *Anales de la Facultad de derecho de la Universidad de la Laguna*,

Reich's chronology of this legal revolution is instructive as well as relevant to today's water policy. In 1879 California's Supreme Court did reject the claim of Los Angeles to all the water in the Los Angeles River within the city's district; both sides cited Hispanic law. In 1881 the Court took a contrary opinion but avoided deciding the doctrine itself. In 1886 the Court boldly employed monopoly language, and again in 1892. In a "definitive ruling" in 1895, "for the first time the state's highest court had held that Los Angeles had an absolute and exclusive right, ostensibly based on Hispanic law" but essentially on an invented "historical myth." An 1899 Supreme Court case then "clarified and extended" the position. As the myth spread among lawyers and boosters, it survived further challenge. A twenty-year legal battle did secure a reversal briefly, with the Hispanic model of sharing applied; but in 1975 the state Supreme Court unanimously retreated to the now-traditional practice of municipal monopoly. From 1943 moreover, the monopolist doctrine "was an established rule," applicable to other Hispanic-origin towns. San Diego indeed had followed the arguments of Los Angeles, eventually winning its own monopoly from the state Supreme Court in 1930.

New Mexico followed the California model but unevenly. Its Supreme Court refused the monopoly status to Santa Fe in 1938, but only on the grounds that "deserters" had irregularly founded it. In 1958 the Court formally allowed that status to Las Vegas, New Mexico, though a new stage of complications was to begin as late as 1994. Texas never abandoned the original doctrine of sharing. In a 1984 case before the Texas court of appeals, for example, Laredo lost its bid for monopolist status.[33]

The legal evolution of municipal water law in the Southwest is mirrored in the irrigation component for agriculture. Hispanic law did not award adjoining water along with a land purchase or grant, but required in each case "an express or implied conveyance from the sovereign." Reich also traces the development away from Hispanic doctrine on that front, with its implications for large landowners and agribusiness.[34] The

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6 (1968-1969), 49-93; cf. Craddock *Legislative Works,* no. C 388. For Hispanic medieval background see the seventeen studies by Thomas F. Glick, *Irrigation and Hydraulic Technology: Medieval Spain and its Legacy* (Brookfield, Vt.: Variorum, 1996). Study no. 16 in this set reproduces his booklet *The Old World Background of the Irrigation System of San Antonio, Texas* (El Paso: Texas Western Press, 1972).

[33] Reich, "Water Law," 884-906, quotations on 893, 894, 906; see also 901 (San Diego), 907 and 910 (Las Vegas), and 912 (Laredo).

[34] Reich, "Water Law," 914 (quote), 914-23 (riparian rights in Texas).

more fascinating legal story, however, is how California and in a general way New Mexico invented a pseudo-Alfonsine municipal water doctrine, a Disney-like fantasy, while Texas held to the original Hispanic position. Though citation of the Alfonsine original in all this owed as much to an overlay of later supplementary codes, Alfonso and his *Partidas* remained a representative icon.

In a dense article on streams or watercourses in the Hispanic legal substratum of Texas law (including adjoined deposits of sand, gravel, and minerals), Joseph McKnight points up two structural frameworks essential to understanding the role of the Hispanic components. "Whereas the Partidas and the commentators speak in terms of sovereign right and control" over streams and irrigation, he notes, Spain itself had instead frequently accepted local usage. Ironically therefore Hispanic law in the New World displayed "a stronger reliance on the doctrine of the Partidas than in Spain itself," so that "water rights adhered here for the most part along the lines of Roman law as transmitted through the Partidas." That development made stream beds, flowing waters, and disposition of irrigation rights decisively "a part of the royal patrimony." Indeed "the words of the Partidas were more literally understood" in the new context "and constituted the basic text for defining the Hispanic system."

McKnight's second observation posits a generation gap in the manner and scale of applying the Hispanic heritage in Texas watercourse law. After English Common Law had become the rule of decision there in 1840, application of Spanish principles became "greatly curtailed." More disastrously for King Alfonso's contributions, "the thread of Hispanic learning" among lawyers and judges in Texas seems to have attenuated "in the period following the Civil War" as a new generation replaced the old, so that "there was little recourse to the law of Spain and Mexico in water law matters until relatively recently." "Well into the present century" only the general impression survived that "water rights and rights affected by water were important elements in Spanish colonial grants in Texas," without much clarity as to exact differences and components. Fortunately, after a half-century of inattention and confusion, Texas experienced a progressive recovery of that understanding. "The first really serious research" on the subject took place in the Grubstake case of 1927 before the Texas Supreme Court, involving "one of the most difficult water puzzles of the Partidas," with the court citing "some American compilations of Spanish and Mexican law" as well as "the Partidas in translation." The field of water law disputes now receives

"close attention," though not all issues in it have been resolved by the new researches.[35]

Conclusion

The ghost of Alfonso el Sabio has waxed and waned within the continental United States but it still haunts our legal system. Partial inquiries such as those presented here are all that an historian can summon until a critical mass of specialist studies will have accumulated, an eventuality not anticipated for our generation. The evidence for Alfonsine lineaments in U.S. law is still largely hidden away within an intimidating mass of court reports. Until that gold can be liberated from its veins and deposits, we must be satisfied with the dedicated labors of a relatively few miners. Awareness for the task ahead will doubtless be promoted by the English version of Alfonso's entire code now being reissued by the University of Pennsylvania Press, after a half-century of obscurity in a few law libraries.

The king's approach in the *Partidas*, or more accurately the approach of the jurisprudents laboring under his active leadership and intervention, was didactic and ethical, "instructive and preventive rather than penal, as definitions and moral maxims are used skillfully to clarify, exhort, or admonish," in some 2700 informal essays on every aspect of life.[36] Alfonso has much to say for environmentalists, for conservation and just distribution of natural resources, for control of business and municipal greed, and even for women's economic rights and dignity. His environmental preoccupations were practical, functional, and respectful both of nature and community. He did not belong to the reactionary "eco-Jacobins" scolded by Thomas Woods, who make nature a Gaian goddess "and Western culture a kind of error."[37] At the same time Alfonso does not subscribe to radical individualism and the supremacy of private exploitation of public resources. The *Partidas* is a medieval code, with all the defects of content and perspectives which that circumstance entails; but it has also carried into our own legal heritage some salutary instruction and some seminal principles.

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[35] McKnight, "The Spanish Watercourses of Texas," *in Essays in Legal History in Honor of Felix Frankfurter* (New York: Bobbs-Merill, 1966), 373-86, quotes from 374, 375, 376, 380, 381, 385, and 386.

[36] MacDonald, "Alfonso's Program," 181.

[37] Woods, "Guest Column," *New Oxford Review*, 66 (1999), 38.